Kerajaan Negeri Johor & Anor v Adong bin Kuwau & Ors

COURT OF APPEAL (KUALA LUMPUR) — CIVIL APPEAL NO J-01-65 OF 1997
GOPAL SRI RAM, SITI NORMA YAAKOB AND ABU MANSOR JJCA
24 FEBRUARY 1998

Constitutional Law *— Right to property — Aboriginal peoples' rights over land — Whether rights exist under common law — Whether rights exclusively governed by Aboriginal Peoples Act 1954 — Federal Constitution art 13 — Aboriginal Peoples Act 1954 ss 5 & 6*

Civil Procedure *— Costs — No order as to costs — Judge gave no reasons for depriving costs — Successful litigant entitled to costs — Whether it is demonstrated that successful litigant had misconducted himself in the conduct of the proceedings to be deprived of costs — Whether judge sufficiently addressed his mind to relevant matters that guide a court's discretion when making order as to costs*

Civil Procedure *— Interest — Discretion to grant — No exercise of discretion by judge on question of interest — Whether proper for appellate court to exercise discretion of its own*

In the High Court, the judge had held that the respondents being the aboriginal people of this country were seized of common law rights over land and were entitled, by reason of art 13(1) of the Federal Constitution, to receive fair and reasonable compensation when such rights were deprived by state action (see [1997] 1 MLJ 418). The appellants appealed and contended that the judge was wrong in holding that there existed any such rights — the respondents' rights and the manner of their enforcement were exclusively governed by the Aboriginal Peoples Act 1954 ('the Act'). Consequently, there was no room for the co-existence of common law rights. The appellants also complained of the quantum awarded by the judge. The respondents cross-appealed against the judge's failure to order costs and interest.

Held, dismissing the appeal and allowing the cross-appeal:

(1) The court entirely agreed with the views expressed by the judge upon the issue of liability. Those views accorded with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds. The judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution. A reading of the

A Act makes it plain that it does not exclude the rights vested in the respondents at common law. The appellants' argument was fallacious because ss 5 and 6 of the Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents' case was not based upon a claim that the land in question was an aboriginal area. They relied upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an 'aboriginal inhabited place' (see p 164D–I).

(2) A perusal of the appeal record revealed that the basis of compensation adopted by the learned judge was fair and reasonable having regard to the submission made by the appellants in the court below. Indeed, it appeared that the judge's award was well below the figure suggested by the appellants at the hearing before the High Court (see p 165A–B).

(3) The judge gave no reasons for depriving the respondents of their costs. There was no suggestion at the trial or in the judgment that the respondents had misconducted themselves to be deprived of costs. The general rule is that a successful litigant is entitled to his costs. Departure from the general rule is only permissible when it is demonstrated that the successful litigant had misconducted himself in such a fashion and to such a degree in the conduct of the proceedings that he ought not to have his costs despite his success. In this case, it did not appear that the judge sufficiently addressed his mind to those matters of relevance that guide a court's discretion when making an order as to costs. Therefore, his order on costs was set aside and substituted in its place that the respondents shall have the costs of the proceedings before the High Court.

On the issue of interest, a court is entitled to deprive a successful party of interest on a monetary claim. But it must clearly state its reasons for doing so. In the present instance, there was no indication anywhere in the judge's judgment that he had refused an award of interest in the exercise of his discretion. Indeed there was no exercise of discretion at all on the question of interest. Consequently, this was a proper case where this court was entitled to exercise a discretion of its own. Taking into account all relevant circumstances of the case, and in the exercise of the court's discretion, it was ordered that the appellants pay interest at the rate of 8% pa upon the sum awarded by the judge from the date of the respondents' originating summons until the date of payment (see pp 165C–I and 166A).

[Bahasa Malaysia summary

Di Mahkamah Tinggi, hakim telah memutuskan bahawa penentang-penentang yang merupakan orang asli negara ini telah dilucut hak common law ke atas tanah dan disebabkan perkara 13(1) Perlembagaan Persekutuan, berhak menerima pampasan yang adil

dan munasabah apabila hak demikian dilucutkan oleh tindakan pihak kerajaan negeri (lihat [1997] 1 MLJ 418). Perayu-perayu membuat rayuan dan berhujah bahawa hakim adalah salah dalam memutuskan bahawa wujudnya hak-hak sedemikian — hak penentang-penentang dan cara penguatkuasaan mereka dikuasai secara eksklusif oleh Akta Orang Asli 1954 ('Akta tersebut'). Berikutnya, tiada ruang untuk hak common law wujud bersama. Perayu-perayu juga mengadu tentang kuantum yang diawardkan oleh hakim. Penentang-penentang membuat rayuan balas terhadap kegagalan hakim untuk membuat perintah atas kos dan faedah.

Diputuskan, menolak rayuan dan membenarkan rayuan balas:

(1) Mahkamah bersetuju sepenuhnya dengan pandangan yang dinyatakan oleh hakim atas isu liabiliti. Pandangan-pandangan itu menurut jurisprudens yang dimantapkan oleh mahkamah kita dan oleh keputusan mahkamah dari bidang kuasa lain yang patut dihormati. Ia kini terbukti dalam bidang kuasa kita bahawa perlucutan punca pencarian seolah-olah sama seperti perlucutan hidup sendiri dan bahawa tindakan kerajaan negeri yang menghasilkan akibat begitu boleh dipersoalkan atas alasan yang mantap. Maka hakim adalah betul dalam menyimpulkan bahawa di mana tindakan kerajaan negeri mempunyai kesan melucutkan seseorang rakyat dengan tidak adilnya atas punca pencariannya, pampasan yang memadai adalah satu cara memulihkan mudarat yang diakibatkan oleh tindakan demikian menurut perkara 13 Perlembagaan Persekutuan. Suatu bacaan Akta tersebut menjadikan ia jelas bahawa ia tidak mengecualikan hak-hak yang diletakhak dalam penentang-penentang di common law. Penghujahan perayu-perayu merupakan salah anggapan kerana ss 5 dan 6 Akta tersebut yang digunakan oleh perayu-perayu adalah berkaitan dengan kawasan asli. Namun demikian, kes penentang-penentang tidak berdasarkan tuntutan bahawa tanah berkenaan adalah kawasan asli. Mereka bergantung pada ketiadaan apa-apa dalam Akta tersebut yang mengecualikan hak common law mereka untuk memperolehi punca pencarian mereka dari tanah yang merupakan suatu 'kawasan yang didiami oleh orang asli' (lihat ms 164D–I).

(2) Satu penelitian rekod rayuan menunjukkan bahawa dasar pampasan yang diterimapakai oleh hakim yang bijaksana adalah adil dan munasabah dengan mengambil kira hujah yang dibuat oleh perayu-perayu di mahkamah bawah. Malah, ia kelihatan bahawa award hakim adalah kurang daripada angka yang dicadangkan oleh perayu-perayu di pembicaraan di hadapan Mahkamah Tinggi (lihat ms 165A–B).

(3) Hakim tidak memberi sebarang alasan dalam melucutkan penentang-penentang daripada kos mereka. Tiada apa-apa cadangan di perbicaraan atau dalam penghakiman bahawa

penentang-penentang telah salah laku hingga dilucutkan kos. Rukun am adalah bahawa seseorang litigan yang berjaya berhak mendapatkan kosnya. Penyimpangan daripada rukun am hanya dibenarkan apabila ia ditunjukkan bahawa litigan yang berjaya telah salah laku dirinya dalam pengendalian prosiding dalam cara dan sehingga takat hinggakan dia tidak patut mendapat kos meskipun kejayaannya. Dalam kes ini, ia tidak kelihatan bahawa hakim telah mempertimbangkan dengan secukupnya perkara-perkara relevan yang membimbing budi bicara mahkamah ketika membuat perintah ke atas kos. Maka, perintah beliau ke atas kos diketepikan dan diganti dengan perintah bahawa penentang-penentang harus mendapat kos prosiding di hadapan Mahkamah Tinggi.

Mengenai isu faedah, sesebuah mahkamah berhak melucut sesuatu pihak yang berjaya daripada faedah atas tuntutan wang. Tetapi ia mesti menyatakan alasannya secara jelas dalam berbuat demikian. Di sini, tidak ditunjukkan di mana-mana dalam penghakiman hakim bahawa beliau telah menolak award faedah dalam pelaksanaan budi bicara beliau. Malah tiada pelaksanaan budi bicara sama sekali atas persoalan faedah. Oleh itu, ini merupakan kes wajar di mana mahkamah ini berhak melaksanakan budi bicara sendiri. Dengan mengambil kira semua keadaan relevan kes, dan dalam pelaksanaan budi bicara mahkamah, ia diperintahkan bahawa perayu-perayu membayar faedah pada kadar 8% setahun atas jumlah yang diawardkan oleh hakim dari tarikh saman pemula penentang-penentang sehingga tarikh bayaran (lihat ms 165C–I dan 166A).]

[*Editorial Note*: The appellants have applied for leave to appeal to the Federal Court.]

Notes

For cases on right to property, see 3 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 1482–1505.

For cases on costs, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 838–1088.

For cases on interest, see 2 *Mallal's Digest* (4th Ed, 1994 Reissue) paras 1726–1768.

Cases referred to

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal [1996] 1 MLJ 481 (refd)

R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 MLJ 145 (refd)

Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261 (refd)

Legislation referred to

Aboriginal Peoples Act 1954 ss 2, 5, 6
Federal Constitution art 13(1)

Appeal from: Originating Summons No 24–828 of 1994 (High Court, Johor Bahru)

Zainal Adzam Abdul Ghani (State Legal Adviser) (*Teo Say Eng*, Senior Federal Counsel, with him) for the appellants.
R Rajasingam (*S Kanawagi* with him) (*Khana & Co*) for the respondents.

Gopal Sri Ram JCA (delivering the judgment of the court): The judgment against which this appeal has been preferred is reported in the law reports. See *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418. In it the learned trial judge has admirably dealt with the factual background, the issues before him and the applicable law. We therefore find it unnecessary to go into these in any detail.

In a gist, the learned judge held that the respondents (plaintiffs in the court below) being the aboriginal people of this country are seized of common law rights over land and are entitled, by reason of art 13(1) of the Federal Constitution, to receive fair and reasonable compensation when such rights are deprived by state action. Dato Zainal Adzam, the learned State Legal Adviser who appeared in support of the appeal (but not in the court below) informed us that the appellants did not quarrel with this proposition. His complaint is that the learned judge was wrong in holding that there existed any such rights as aforesaid. According to the learned State Legal Adviser, the respondents' rights and the manner of their enforcement are exclusively governed by the Aboriginal Peoples Act 1954 ('the Act'). Consequently, there is no room for the co-existence of common law rights. Before we express our views upon the correctness of the submissions made in support of the appeal, it is important that we hearken to certain passages in the judgment of the learned judge which were drawn to our attention by the learned State Legal Adviser and which form the subject matter of the appellants' complaint.

The first of these passages appears at p 50 of the appeal record and reads ([1997] 1 MLJ 418 at p 430):

> My view is that, and I get support from the decision of *Calder*'s case [*Calder v A-G of British Columbia* (1973) 34 DLR (3d) 145] and *Mabo*'s case [*Mabo & Ors v State of Queensland & Anor* (1986) 64 ALR 1], the aboriginal peoples' rights over the land include the right to move freely about their land, without any form of disturbance or interference and also to live from the produce of the land itself, but not to the land itself in the modern sense that the aborigines can convey, lease out, rent out the land or any produce therein since they have been in continuous and unbroken occupation and/or enjoyment of the rights of the land from time immemorial. I believe this is a common law right which the natives have and which the Canadian and Australian courts have described as native titles and particularly the judgment

of Judson J in *Calder*'s case at p 156 where his Lordship said the rights and which rights include '... the right to live on their land as their forefathers had lived and that right has not been lawfully extinguished ...'. I would agree with this ratio and rule that in Malaysia the aborigines' common law rights include, inter alia, the right to live on their land as their forefathers had lived and this would mean that even the future generations of the aboriginal people would be entitled to this right of their forefathers.

The next passage is at pp 52–53 of the appeal record ([1997] 1 MLJ 418 at pp 430–431). In it the judge said:

> These people live from the hunting of animals in the jungle and the collection of jungle produce. Those are the only source of their livelihood and income. Can these rights be taken away by the government without compensation? At a glance this could be done, but upon looking further and deeper, it is my opinion that compensation ought to be made. This can be discerned from s 11 of the Act, which guarantees adequate compensation for land, bearing rubber or fruit trees claimed by the aboriginal people, that is alienated. It is clear to me that the land on which those trees are planted is either a reserve land for the aboriginal people or an area where they had a right to access, which is a jungle reserve. In the first case, there is no problem because it is their reserved land. In the second case, it is clear that the land belongs to the state but they were planted by the aborigines. As such, adequate compensation must be made for these trees but not for the land. In the present case, I am of the view that adequate compensation for the loss of livelihood and hunting ground ought to be made when the land where the plaintiffs normally went to look for food and produce was acquired by the government. The compensation is not for the land but for what is above the land over which the plaintiffs have a right.
>
> The Act does not limit the aborigines' rights therein. In order to determine the extent of aboriginal peoples' full rights under law, their rights under common law and statute has to be looked at conjunctively, for both these rights are complementary, and the Act does not extinguish the rights enjoyed by the aboriginal people under common law.

The third passage, which is at p 59 of the appeal record ([1997] 1 MLJ 418 at pp 433–434), reads:

> I will now proceed to examine whether the plaintiffs were deprived of proprietary rights protected by the Federal Constitution art 13(1).
>
> At the time the defendants entered into an agreement with the Government of the Republic of Singapore and built a dam in the Linggiu valley, the plaintiffs' rights of free access into Linggiu valley and to harvest the fruits of the jungle were unchallenged and recognized in law. It is the building of the dam that brought the plaintiffs' freedom of movement within the Linggiu valley, which is guaranteed by the Federal Constitution art 9(2), to an end and subsequently extinguished the plaintiffs' rights to collect the forest produce which are recognized at common law and statutory law.
>
> The plaintiffs' statement that the forest was a source of their livelihood was not rebutted by the defendants and neither was there evidence that there was a break in the continuous occupation and traditional connection in the land for their livelihoods.

> It has been long recognized under our law that when a person is deprived of any proprietary right under an executive exercise pursuant to powers given by statute, that person must be compensated.

The final passage is at p 65 of the record of appeal ([1997] 1 MLJ 418 at p 436). It reads:

> For a case involving the plaintiffs, I would state that the plaintiffs had suffered deprivation of the following types of interest in the land:
>
> (1) deprivation of heritage land;
>
> (2) deprivation of freedom of inhabitation or movement under art 9(2);
>
> (3) deprivation of produce of the forest;
>
> (4) deprivation of future living for himself and his immediate family; and
>
> (5) deprivation of future living for his descendants.

We can find nothing objectionable in the foregoing passages. Indeed, we entirely agree with the views expressed by the learned judge in his judgment upon the issue of liability. Those views accord with the jurisprudence established by our courts and by the decisions of the courts of other jurisdictions which deserve much respect. It is now settled beyond argument in our jurisdiction that deprivation of livelihood may amount to deprivation of life itself and that state action which produces such a consequence may be impugned on well-established grounds. See *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481. The learned judge was therefore correct in concluding that where state action has the effect of unfairly depriving a citizen of his livelihood, adequate compensation is one method of remedying the harm occasioned by such action pursuant to art 13 of the Federal Constitution.

We are therefore unable to agree with the submissions of the learned State Legal Adviser and his criticism of the learned judge's judgment. A reading of the Act makes it plain that it does not exclude the rights vested in the respondents at common law. As pointed out by the learned judge, and by counsel for the respondents during argument before us, the Act in s 2 creates a distinction between an 'aboriginal area' and an 'aboriginal inhabited place'. These are defined as follows:

> 'aboriginal area' means an aboriginal area declared to be such under this Act.
>
> 'aboriginal inhabited place' means any place inhabited by an aboriginal community which has not been declared to be an aboriginal area or aboriginal reserve.

Sections 5 and 6 of the Act which were relied upon by the appellants are concerned with an aboriginal area. However, the respondents' case is not based upon a claim that the land in question was an aboriginal area. They rely upon the absence of anything in the Act that excludes their common law rights to derive their livelihood from land which is an 'aboriginal inhabited place'. Herein lies the fallacy in the appellants' argument.

A The learned State Legal Adviser also complained of the quantum awarded by the learned judge. However, a perusal of the appeal record reveals that the basis of compensation adopted by the learned judge is fair and reasonable having regard to the submission made by counsel who appeared for the appellants in the court below. Indeed, it appears that the learned judge's award is well below the figure suggested by the appellants B at the hearing before the High Court.

That brings us to the respondents' cross-appeal which is directed against the learned judge's failure to order costs and interest. It is elementary law that costs and interest are matters within the discretion of a trial judge and that this court will not lightly interfere with the exercise of C such discretion.

In the present instance, the learned judge made no order as to costs. However, he gave no reasons for depriving the respondents of their costs. There was no suggestion at the trial or in the judgment that the respondents had misconducted themselves to be deprived of costs. The general rule is D that a successful litigant is entitled to his costs. Departure from the general rule is only permissible when it is demonstrated that the successful litigant had misconducted himself in such a fashion and to such a degree in the conduct of the proceedings that he ought not to have his costs despite his success. A court may also make no order as to costs where the successful party says that he is not seriously asking for an order of costs in his favour. E In this case, it does not appear that the learned judge sufficiently addressed his mind to those matters of relevance that guide a court's discretion when making an order as to costs. In our judgment, there was no proper exercise of discretion on the question of costs. We therefore set aside his order on costs and substituted in its place that the respondents shall have the costs F of the proceedings before the High Court. However, counsel for the respondents informed us that he was not pressing for costs of the appeal, and for that reason we made no order as to costs of the proceedings before us.

Turning now to the issue of interest, it is now well recognized that G the purpose of an award of interest is to compensate a plaintiff who has been kept out of money that was lawfully due to him. Of course, a court of justice is entitled to deprive a successful party of interest on a monetary claim. But it must clearly state its reasons for doing so. In the present instance, there is no indication anywhere in the learned judge's judgment that he had refused an award of interest in the exercise of his discretion. H Indeed there was no exercise of discretion at all on the question of interest. Consequently, this is a proper case where this court is entitled to exercise a discretion of its own. It is clear from the finding of the learned judge, with which we have expressed our unqualified agreement, that the respondents were entitled to be compensated for the deprivation of their I livelihood. They ought to have been paid the compensation so soon as the wrong was done them. Taking into account all relevant circumstances of the case, and in the exercise of our discretion, we ordered the appellants to pay interest at the rate of 8% pa upon the sum awarded by the judge from

the date of the respondents' originating summons, that is to say, from 4 November 1994 until the date of payment.

For the reasons given, the appeal was dismissed. The finding of the judge on liability and quantum was affirmed. The cross-appeal was allowed. We made no order as to the costs of the appeal and the cross-appeal.

Appeal dismissed; cross-appeal allowed.

Reported by Jafisah Jaafar